

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-190787

DATE: August 31, 1978

MATTER OF: Gould, Inc.

DIGEST:

Since solicitation provision, reciting that contract will encompass certain specialized work and that successful bidder must, upon request of contracting officer, submit data relative to bidder's ability to perform such work, establishes definitive criterion, compliance with which is prerequisite to affirmative determination of bidder responsibility, agency's award of contract without regard to that provision is improper. GAO recommends that option to extend term of contract not be exercised.

Gould, Inc. (Gould) protests the award of a requirements contract for the overhaul and repair of heavy duty industrial storage batteries under invitation for bids (IFB) No. N62470-77-B-3127, issued by the Department of the Navy. The contract was awarded to T. M. Wardian Associates, Inc. (Wardian), the low bidder responding to the invitation. Gould's objection is that award to Wardian is inconsistent with the experience requirements set forth in the IFB.

The experience requirements were set forth as follows:

"1A.3 Contractor's experience. Some of the batteries to be overhauled and repaired under this contract are for shipboard use. The batteries are of special construction having to pass

electro-magnetic interference suppression tests, to be explosion proof, be spark proof and salt-fog-saline corrosion resistant. The successful contractor shall submit after the bid opening but prior to award, upon request by the contracting officer, data to show that he has the skilled personnel, facilities and equipment necessary to manufacture or overhaul and repair batteries of this type without violating the design integrity of the batteries."

The Navy reports that, after bid opening, it was determined that there was no present requirement for repairing shipboard batteries, that the contracting officer did not request Wardian to submit any data bearing on its ability to repair batteries intended for shipboard use, and that an affirmative determination of responsibility with regard to Wardian was made on the basis of a "responsibility check."

We view the Navy's action as improper. The IFB clearly stated that shipboard batteries would be encompassed by the contract and that the successful bidder would have to submit data indicating an ability to repair such batteries "upon request by the contracting officer." We believe that this quoted language, particularly in light of the IFB language which precedes it, can reasonably refer only to when (and not if) the contracting officer will request the data. Thus, the IFB provision establishes a definitive responsibility criterion, relating to a bidder's submission of data regarding its ability and capacity to repair shipboard use batteries, which must be complied with as a condition of award. See Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, affirmed 54 Comp. Gen. 715 (1975), 75-1 CPD 138; Mosler Airmatic Systems Division, B-187586, January 21, 1977, 77-2 CPD 42.

As we have recently pointed out, when a solicitation contains a restriction on competition such as a

definitive criterion of responsibility, sound procurement policy requires that the criterion be rigidly enforced because other potential bidders may have been kept from bidding because of the IFB restriction and those bidders who did participate may have fashioned their bids on the basis of the competition expected in light of the restriction. See Gould, Inc., et al., B-190969, August 4, 1978, 78-2 CPD _____. Thus, in this case, Gould's bid might well have reflected both the cost of the expertise it believed necessary for contract performance and the viable competition it anticipated on the procurement, while Wardian, allegedly without the experience and expertise required by the IFB, might have been able to bid lower as a result. In short, the Navy's failure to enforce the IFB provision may have resulted in an unfair competitive situation. To avoid that situation the Navy, once it determined that the shipboard battery experience requirement was not necessary, should have canceled the IFB and resolicited without the restriction. See Haughton, supra; 39 Comp. Gen. 173 (1959).

In essence, what happened here is that the Navy issued a solicitation calling for more than was actually required. Since the specified requirement for repair of shipboard batteries went beyond the Navy's needs, the solicitation was defective as unduly restrictive of competition and, as indicated above, should have been canceled rather than utilized as a vehicle for awarding a contract. Westinghouse Electric Corporation, B-187984, September 2, 1977, 77-2 CPD 171; Haughton, supra.

Although the contract was improperly awarded, we do not view contract termination as necessary at this point since the contract is a one year requirements contract with a one year renewal option and was awarded nearly a year ago, on October 31, 1977. We recommend, however, that the option not be exercised.

The protest is sustained.

R. F. K. 114
Deputy Comptroller General
of the United States